STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

In the Matter of the Application of

SIERRA CLUB, CONCERNED CITIZENS OF ALLEGANY COUNTY, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., JOHN E. CULVER, and BRIAN AND MARYALICE LITTLE,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. E2019-O441CV

-against-

Hon. Patrick F. McAllister

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, COMMISSIONER, TOWN BOARD OF THE TOWN OF CAMPBELL, and HAKES C&D DISPOSAL INC.,

Respondents.

REPLY MEMORANDUM OF LAW IN SUPPORT OF STATE RESPONDENTS' MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATE REGULATIONS

PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation submits this reply memorandum of law in further support of its motion to dismiss the amended petition on grounds that the challenge is time-barred. Although petitioners *now* admit that they knew that DEC considered and assessed radioactivity levels in drill cuttings when it processed Hakes's 2012 Part 360 permit modification application, and again addressed and analyzed those issues when it amended the Part 360 regulations in 2017, they dispute the relevance of those determinations to their claims. Instead, they contend that their claims should be measured against a 2015 determination that addresses hydrofracking, an activity that is not – and has never been – authorized under Hakes's Part 360 permit. Petitioners' illogical explanation – and reliance on a determination that has no bearing on the issues in this proceeding – cannot revive their stale claims. The Court should therefore dismiss the amended petition because the proceeding is time-barred.

ARGUMENT

POINT I

THE CHALLENGE IS TIME-BARRED

1. Petitioners Had Notice of But Did Not Challenge DEC's Determinations Authorizing and Regulating the Disposal of Drill Cuttings.

Two prior determinations are central to the issues raised in this proceeding: DEC's issuance of a 2012 Part 360 permit modification to Hakes, which included conditions regulating drill cuttings, and the Part 360 Series drill cuttings' radioactivity standards, adopted in 2017. Petitioners concede they had notice of each determination but argue that they could not have challenged them because the issues underlying those determinations "are not at issue in this proceeding" (Petitioners' Reply Memorandum of Law at 3). To the contrary, petitioners'

challenge to Hakes's authorization to dispose drill cuttings is untimely because the Department made the relevant determinations more than four months ago.

Hakes's permits have contained provisions regulating the disposal of drill cuttings since 2012 (Affidavit of Mark Amann ¶¶ 20-22). DEC considered and addressed the radioactivity issues at the heart of petitioners' complaints when it processed Hakes's 2012 permit application. That permit set a measurable limit for the maximum radioactivity level of any waste that could be disposed; required a protocol to prevent waste disposal above that level (e.g., proper operation of radiation detectors to monitor incoming waste); and included requirements for testing radionuclides in landfill leachate (Amann Aff ¶¶ 20-22, Exhibit A-10; Affirmation of Lisa Schwartz ¶ 16). Having failed to seek timely review of those 2012 conditions – which petitioners do not dispute were carried forward in the now challenged 2019 Part 360 permit – they may not challenge them now (*Cannon Point Preservation Corp., v City of New York*, 2019 NY Slip Op 32733[U], *3-6 [Sup Ct, New York County 2019], *affd* 183 AD3d 416 [1st Dept 2020] [the court rejected petitioners' attempt to reopen SEQRA review by challenging subsequent actions relative to City's initial determination on park development]; *Matter of Mule v Hawthorne Cedar Knolls Union Free School Dist.*, 290 AD2d 698, 699 [3d Dept 2002] [four-month limitations period to challenge Dormitory Authority's determination under SEQRA began to run on date on which it issued bonds to fund project and committed itself to a definite course of future action]; *Dujmich v New York State Freshwater Appeals Bd.*, 240 AD2d 743, 743 [2d Dept 1997] [challenge to determination of the State Freshwater Wetlands Appeals Board directing DEC to issue permit authorizing development of wetlands property brought over five years after grant of permit was time barred]).

Nor may petitioners seek to excuse their failure to challenge the Part 360 amendments by arguing that the standards set are irrelevant to their claims. This assertion is absurd in the face of petitioners' complaints about the standards for radiation detection and leachate testing in Hakes's 2019 permit (Pet ¶¶ 20-22; Pet Reply MOL at 12). Petitioners admit that they knew about the Part 360 rule-making process, and that they participated in the process (Pet Reply MOL at 4,12).[1] As a result they knew that standards were set not as part of the permit modification process but instead in 2017 by the Part 360 Series – which prescribes a *specific* radioactivity level for regulatory compliance, along with *new* analytical requirements for measuring leachate radionuclides. Petitioners also knew that these, among other new standards, would – and had to – be added to Hakes's 2019 permit to align it with the 2017 Part 360 revisions (6 NYCRR 360.4[b][3]; 6 NYCRR 363-4.6[n]; 363-7.1[a][5][i]; 363-7.1[a][3]; 363-7.1[o]). However, not one of them filed an Article 78 proceeding challenging the adopted standards they complain of in this proceeding (*Matter of Eadie v Town Bd. of N. Greenbush*, 7 NY3d 306, 317 [2006] [where SEQRA review preceded adopted zoning change, Article 78 to challenge zoning change must be brought within four months of the time the change is adopted]; *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 200 [1997] ["proceeding alleging SEQRA violations in the enactment of legislation must be commenced within four months of the date of enactment of the ordinance."]).

[1] Petitioners Sierra Club and Concerned Citizens of Alleghany County submitted comments on the proposed rulemaking, confirming they were well aware of, and impacted by, the proposed revisions, including the prescribed regulatory standards for radiation detection and leachate testing (Schwartz Aff ¶ 18, 26, Exhibit F).

2. The Commissioners' 2015 Findings Statement on High-Volume Hydraulic Fracturing is Irrelevant Because it Addresses Activities Not Authorized Under Hakes's Part 360 Permit.

Petitioners imply that nefarious motives are behind the State's failure to cite to the DEC Commissioner's 2015 Findings Statement on the Final Supplemental Generic Environmental Impact Statement on the Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs (2015 HVHF Findings) and the 2014 hydrofracking ban (Pet Reply MOL at 5). There was no reason for the State to mention or support its motion with the 2015 HVHF Findings because they have no bearing on this case. Since 2006, Hakes's Part 360 permit has only allowed for landfilling of drill cuttings, not hydrofracking waste.[2] Petitioners know that the processes involved in HVHF – which has been banned in New York since 2014 – are different than those that generate drill cuttings. Indeed, the 2015 HVHF Findings (relied upon by petitioners) expressly distinguish drill cuttings from hydrofracking wastes (Pet MOL at 5; Exhibit A to the affirmation of Rachel Treichler). The 2014 hydrofracking ban, codified earlier this spring, is as irrelevant to this proceeding as the 2015 HVHF Findings; neither addresses the disposal of drill cuttings. Moreover, petitioners admit that the ban does not pertain to drill cuttings (Pet Reply MOL at 6).

Petitioners also claim that the 2015 HVHF Findings should have changed DEC's regulation of drill cuttings disposal at Hakes's landfill (Pet Reply MOL at 5). Petitioners ignore, however, that the 2017 Part 360 revisions – which were adopted after the 2015 HVHF Findings –

[2] Drill cuttings are produced when a well is being drilled, while hydrofracking waste (a subject discussed by the 2015 HVHF Findings) results after a well has been drilled (Amann Aff, Exhibit A-13 [Responsiveness Summary, p. 2]).

incorporated much of the regulatory drill cutting requirements imposed on Hakes in the 2012 permit modification.

In sum, petitioners' mischaracterization of the issues here is an attempt to focus attention away from their failure to timely challenge either Hakes's 2012 permit or the 2017 Part 360 amendments. Their request that this court direct DEC to reassess issues that have already been evaluated and determined is an attempt to undermine well-established procedural and regulatory mandates applicable to the review of agency actions, which cannot serve to extend the limitations period (*Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 34-35 [1st Dept 2005] [SEQRA challenge must be commenced within four months of determination subject to SEQRA review]; *Matter of Cora Johnson v Christian, Chairman of the New York City Hous. Auth.*, 114 AD2d 321, 322-323 [1st Dept 1985] [application to reconsider administrative determination does not extend original four-month limitations period within which proceeding for judicial review must be commenced]). Petitioners' claims are untimely.

POINT II

ANY CHALLENGE TO THE ADDITIONAL PERMITS ISSUED TO HAKES IS BARRED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Along with the Part 360 permit, in December 2019, DEC issued to Hakes an Air State Facility Permit and a Clean Water Act Section 401 Water Quality Certification (401 Certification), which petitioners also seek to annul (Pet ¶¶ 1-2). Petitioners concede that the petition contains no allegations specific to the Air State Facility permit or the 401 Certification, and that they voiced no concerns to DEC about either permit prior to issuance. They suggest that a court may annul a permit when no justification for doing so is provided (Pet Reply MOL at 7). Courts disagree (*Morales v Patel*, 232 AD2d 319, 320 [1st Dept 1996] [dismissing Article 78 where petitioner failed to allege facts in support of claims]; *D'Aiuto v Department of Water*

Resources, 51 AD2d 700, 701 [1st Dept 1976] [dismissing Article 78 where petitioner failed to demonstrate right to relief by alleging facts in support of claims]. Contrary to petitioners' belief, *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000], is not inapposite. *Featherstone* stands for the proposition that judicial review of an agency determination is confined to the facts and record that were before the agency (*id*.). As no facts relative to the additional permits were presented to DEC during the administrative proceedings, petitioners' claims are not properly before this Court.

CONCLUSION

Petitioners do not dispute that they knew that DEC had approved the disposal of drill cuttings at Hakes' landfill. They also do not dispute that they knew that DEC had considered radioactivity issues relative to drill cuttings and determined that drill cuttings are subject to regulation as C&D debris under Part 360, and not as radioactive material under Part 380. Yet they offer no plausible excuse for their failure to seek review of any of the issues they complain of until now. Because this challenge also amounts to an untimely and impermissible collateral attack on the adopted rules, the proceeding should be dismissed. If the Court denies the State's motion in whole or part, DEC respectfully requests 30 days from the date of service of the Court's order denying the motion to submit an answer and file a return.

Dated: July 2, 2020
Albany, New York

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